DePaul Law Review

Volume 56
Issue 3 *Spring 2007: Symposium - Ties That Bind: Family Relationships, Biology, and the Law*

Article 13

Tainted Love: What the Seventh Circuit Got Wrong in Muth v. Frank

Brendan J. Hammer

TAINTED LOVE: WHAT THE SEVENTH CIRCUIT GOT WRONG IN *MUTH V. FRANK*

INTRODUCTION

Perhaps no taboo is older or more entrenched than the incest taboo.[1] Nevertheless, the practice of sexual relations between blood relatives is as persistent and powerful as the taboo.[2] When one thinks about incest, many images come to mind. Perhaps it is the relatively benign image of "kissin' cousins"[3] in a moonshine-fueled backwoods pairing. Perhaps it is the sickening thought of the violent sexual abuse of a child at the hands of her father or brother. Whatever one's initial impression, people are generally not comfortable talking or thinking about incest, much less admitting familiarity with it. Incest in America remains, for the most part, a hidden practice; it has supplanted homosexuality as "[t]he love that dare not speak its name."[4]

---

1. *See generally* EMILE DURKHEIM, INCEST: THE NATURE AND ORIGIN OF THE TABOO (Edward Sagarin trans., Lyle Stuart, Inc. 1963) (1898); SIGMUND FREUD, *Three Contributions to the Theory of Sex*, *in* THE BASIC WRITINGS OF SIGMUND FREUD 551 (Dr. A.A. Brill trans., 1938); CLAUDE LÉVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP (Rodney Needham ed., James Harle Bell & John Richard von Sturmer trans., Beacon Press 1969) (1949); EDWARD WESTERMARCK, THE HISTORY OF HUMAN MARRIAGE (5th ed. 1922).

2. *See infra* notes 26–47 and accompanying text.

3. The term "kissin' cousins" denotes a rural sensibility, even when not attached to incest per se. The phrase was used most famously as the title of a 1964 film staring Elvis Presley in dual roles as a man and his "hayseed" cousin. KISSIN' COUSINS (Warner Brothers Studios 1964). Elvis Presley also sang a same-titled homage of sorts to the practice of cousin incest in the film:

> Kissin's allowed 'cos we're proud to be cousins
> What's a little teasin', huggin' and a-squeezin'
> Between us cousins.
> Oh it's so great to be one big family
> And we show it, yes we show it
> You see, we never feud, we're a happy brood
> Folks all know it, yes they know it . . .
> Honey we dress and we mess
> We're just cousins
> Cousins, kissin' cousins . . . .

ELVIS PRESLEY, *Kissin' Cousins number 2*, *on* KISSIN' COUSINS/CLAMBAKE/STAY AWAY, JOE (BMG Records 1994).

4. *See* MICHAEL S. FOLDY, THE TRIALS OF OSCAR WILDE: DEVIANCE, MORALITY, AND LATE-VICTORIAN SOCIETY (1997). In (Oscar Wilde's first criminal trial, he stated his famous defense of homosexuality during cross examination by attorney Charles Gill:

> "The love that dare not speak its name" in this century is such a great affection of an elder for a younger man as there was between David and Jonathan, such as Plato made the very basis of his philosophy, and such as you find in the sonnets of Michelangelo and Shakespeare. . . . It is in this century misunderstood, so much misunderstood that it may be described as the "Love that dare not speak its name," and on account of it I am

There is no incest lobby in the halls of Congress, no incest legal defense fund, and no incest pride parade.[5] Incest, as the conventional wisdom goes, is universally proscribed; it is perversion *par excellence*.[6] It is exactly the kind of behavior that the Constitution does not protect and criminal law was meant to prohibit. Or is it?

In June 2005, the Seventh Circuit Court of Appeals decided *Muth v. Frank*, a case challenging the constitutionality of Wisconsin's criminal incest statute.[7] *Muth* involved two blood relatives who did not even know each other until adulthood, when they met, fell in love, and engaged in sexual relations.[8] They went on to have several children, but the State of Wisconsin removed the children from their custody and sentenced them to maximum security prison.[9] The couple appealed their conviction, arguing that after *Lawrence v. Texas*, private consensual sex between adults cannot be legislatively proscribed in most situations.[10] The Seventh Circuit disagreed, holding that *Lawrence* did not announce a fundamental right to sexual liberty that protected consensual incest. Instead, *Lawrence* was limited to legislative prohibitions against "homosexual sodomy."[11] In practical terms, the *Muth* decision meant that a consenting, adult couple could have their children removed from their care and be placed in prison because, according to the Seventh Circuit, *Lawrence* only protected the right of two men to engage in anal or oral sex.

This Note explores how the Seventh Circuit erred in its decision in *Muth v. Frank*, raising implications beyond the narrow realm of criminal incest statutes. Part II surveys the historical and contemporary status of incest in both law and culture,[12] and highlights the cases that

---

> placed where I am now. . . . The world mocks at it and sometimes puts one in the pillory for it.

Id. at 117 (citation omitted). The phrase has since been used for decades to refer to the transgressive nature of homosexuality. A recent article about incest offered a humorous play on this phrase. *See* William Saletan, *The Love That Dare Not Speak Its Surname: What's Wrong With Marrying Your Cousin?*, SLATE, Apr. 10, 2002, http://www.slate.com/id/2064227.

5. *See* Brett H. McDonnell, Comment, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337 (2004) (noting that the lack of political and popular support for incest differentiates it from sodomy in important ways). *But see* Nancy J. White, *Kissing Cousins*, TORONTO STAR, July 3, 2004, L1 (interviewing a representative of CUDDLE International (Cousins United to Defeat Discriminating Laws through Education), an organization whose goal is to deal with issues of consanguineous marriage).

6. *See generally* FREUD, *supra* note 1.

7. 412 F.3d 808, 810 (7th Cir.), *cert. denied*, 126 S. Ct. 575 (2005).

8. *Id.* at 810–11.

9. *See infra* notes 121–128 and accompanying text.

10. *See infra* notes 131–141 and accompanying text.

11. *See infra* notes 137–146 and accompanying text.

12. *See infra* notes 20–67 and accompanying text.

serve as a backdrop to *Muth*.[13] Part III explores the Seventh Circuit's decision in *Muth*.[14] Part IV argues that the *Muth* court was wrong in not extending *Lawrence* to consensual incest, and attacks the traditional justifications for criminal incest statutes.[15] Part V discusses the potential impact of *Muth* on other areas of the law, and explores the ethical and policy implications of the courts' scatter-shot approach to "sex" jurisprudence.[16] This Note concludes that criminal incest statutes cannot survive even rational basis review.

II. BACKGROUND

Prior to any discussion of the legal arguments concerning criminal incest statutes, some initial definitions and understandings are in order. This Part reviews the history of incest and describes its various forms.[17] It also surveys the statistical prevalence of the practice of incest.[18] Finally, this Part explores the various legal responses to the practice of incest and describes the constitutional precedents applicable in *Muth v. Frank*.[19]

A. Forms of Incest

There are two different forms of incest, which may require two different legal responses. But before one can differentiate between the two, and assess the appropriate legal responses to each, it is essential to know what is meant when courts and legislatures speak of incest in the law. Incest, like sodomy, is a powerful word, laden with emotion: it has an amazing ability to mean different things in different contexts.[20] A less emotional, but nonetheless ambiguous, term is consanguinity.[21] Consanguinity refers to the degree of blood relation

13. *See infra* notes 68–112 and accompanying text.
14. *See infra* notes 113–146 and accompanying text.
15. *See infra* notes 147–252 and accompanying text.
16. *See infra* notes 253–259 and accompanying text.
17. *See infra* notes 20–43 and accompanying text.
18. *See infra* notes 44–47 and accompanying text.
19. *See infra* notes 48–67 and accompanying text.
20. "Incest" is defined as "[s]exual relations between family members or close relatives, including children related by adoption." BLACK'S LAW DICTIONARY 776 (8th ed. 2004). But as the remainder of this Note demonstrates, the crime of incest varies from state to state. Likewise, sodomy was subject to varied interpretations at different times. *See generally* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999).
21. "Consanguinity" is defined as "[t]he relationship of persons of the same blood or origin." BLACK'S LAW DICTIONARY, *supra* note 20, at 322. "Collateral consanguinity" is defined as "[t]he relationship between persons who have the same ancestor but do not descend or ascend from one another (for example, uncle and nephew, cousins, etc.)." *Id.* "Lineal consanguinity" is defined as "[t]he relationship between persons who are directly descended or ascended from one another (for example, mother and daughter, great-grandfather and grandson, etc.)." *Id.*

between two people.[22] There are various levels of consanguinity, just as there are skins on an onion; the closer the relation, the greater the level of consanguinity. "Incest" describes a relationship the government has chosen to proscribe, drawing the line somewhere on the skin of the consanguineous onion. Incest can be defined not only by blood (consanguinity) but by marriage (affinity).[23]

With those provisional definitions settled, one can turn to the distinct forms of incest. The first variety can be thought of as "coercive incest." Coercive incest is the "rape-like" sexual abuse by an adult parent, relative, or older sibling of a minor child.[24] This form of incest is not the concern of this Note. It can and should remain criminally sanctioned through existing rape, sexual assault, and molestation laws.[25] The second variety of incest can be termed "consensual incest," or sexual relations between competent, consenting, consanguineous adults. It is this form of incest that is the subject of this Note.

B. Historical Survey of Incest

A brief survey of the history of consensual incest is required to adequately understand *Muth* and its policy implications, as well as to understand how common the practice is. A simple recitation of the facts of *Muth*, or mere reference to American law, would fail to give the full picture.

Incest has ancient roots and persists in every part of the world to this day, sometimes with a surprising degree of acceptance.[26] Incest has existed since the beginning of time and has meant something very different to each culture. It is, as one scholar noted, "[s]o widespread

---

22. One of the most prolific scholars in this area has summarized consanguinity:

> As a working definition, unions contracted between persons biologically related as second cousins ($F \geq 0.0156$) are categorized as consanguineous. This arbitrary limit has been chosen because the genetic influence in marriages between couples related to a lesser degree would usually be expected to differ only slightly from that observed in the general population.

A.H. Bittles, A Background Summary of Consanguineous Marriage 2 (Ctr. for Human Genetics at Edith Cowan Univ., May 2001).

23. *See* Commonwealth v. Rahim, 805 N.E.2d 13, 15 (Mass. 2004). *Rahim* held that the Massachusetts incest statute only criminalized relationships between persons by blood or adoption, not marriage. *Id.* The court's opinion provides a searching analysis of the current status of incest laws based on affinity.

24. Incest predominately occurs in this form. Statistics indicate that 75% of incest occurs between a parent and child, most of which is perpetrated by an older male relative on a younger female relative. *See* Richard Krugman & David P.H. Jones, *Incest and Other Forms of Sexual Abuse*, *in* THE BATTERED CHILD (Ray E. Helfer & Ruth S. Kemp eds., 4th ed. 1987).

25. Wisconsin's statutory regime already criminalizes sexual assault, sexual assault of a child, and sexual exploitation of a child. WIS. STAT. ANN. §§ 940.225, 948.02, 948.05 (West 2005).

26. *See infra* notes 29–47 and accompanying text.

and affectively laden . . . that it is generally regarded . . . [as] the evolutionary Rubicon of human social life."[27] One could argue that the first example of incest was Adam copulating with Eve, the very flesh of his flesh and bone of his bone.[28] Even aside from that admittedly conjectural "example," the history and folklore of ancient cultures are rife with examples of consensual incest, indicating that it was present and even flourishing in those cultures to varying degrees.

For instance, in the folklore of ancient Mesopotamia, the god Enlil created life on earth by committing incest with his mother, Ki.[29] The myth represented the cultural reality of sexual practices at the time. Incest was common among the ruling clans of Mesopotamia, who were permitted to marry and mate consanguineously.[30] In Egypt, folklore indicates that Tefnut married her brother, the god Shu; their coupling created Geb and Nut who, in turn, married each other and had consanguineous offspring of their own.[31] Most notable was the famed relationship between Osiris and his sister Isis, a myth that dates to at least 3000 B.C.E.[32] In terms of actual Egyptian mores and law, marriage between brothers and sisters was permitted by the Egyptians,[33] though it was mostly confined to royal families.[34] In the Near East, incestuous acts were generally "contrary to the Mosaic Law,"[35] but the Old Testament is replete with examples of consensual incest that went unpunished, and were arguably rewarded.[36]

In ancient Persia, consanguineous pairings were permitted among the ruling class, and "certainly were celebrated by the kings at the Persian court."[37] In ancient Greece, there is no more infamous example of incest than the fateful case of Oedipus and Jocasta.[38] While marriage between full brother and sister was historically proscribed, marriage between half-siblings was permitted under Greek law.[39] In Japan, consanguineous marriages at varying levels of relatedness are

27. Seymour Parker, *The Waning of the Incest Taboo*, 11 LEGAL STUD. F. 205, 206 (1987).

28. *Cf. Genesis* 20:12.

29. P.B. Adamson, *Consanguinous Marriages in the Ancient World*, 93 FOLKLORE 85, 85 (1982).

30. *See id.*

31. *Id.*

32. *Id.*

33. *See* Russell Middleton, *Brother-Sister and Father-Daughter Marriage in Ancient Egypt*, 27 AM. SOC. REV. 603, 603 (1962).

34. *See id.* at 603–05.

35. Adamson, *supra* note 29, at 86.

36. *See generally Genesis* 20:12; *Leviticus* 18:6–18, 20:11–21; *Numbers* 26:58–59; *Deuteronomy* 27:22.

37. Adamson, *supra* note 29, at 86.

38. *Cf. id.* at 88.

39. *Id.*

more accepted. In Japanese manga and anime,[40] for example, incest is more frequently, thoroughly, and objectively explored than in the West.[41] Notable instances of consanguineous unions in Western culture include Charles Darwin and his first cousin Emma Wedgewood, who had ten children together; Albert Einstein also married his first cousin.[42] Frequent consanguineous unions occurred within the Rothschild family and in numerous royal families, most notably the Hapsburgs and the royal families of Hawaii.[43]

C. *Statistical Prevalence of Incest*

Statistics show that incest is even more widespread than the anecdotal evidence would indicate. The frequency of consanguineous pairings varies across the world. Consanguineous unions in the predominately Muslim countries of the Near East, Pakistan, and North Africa account for 20% of all unions, and in many areas it exceeds 50%.[44] By contrast, the prevalence of consanguineous unions between first cousins in North America, Japan, South America and Western Europe occur in anywhere from 1% to 10% of the population.[45] Japan, with consanguineous rates traditionally between 6% and 9%, frequently sees marriages between blood-related aunts and nephews, as well as first cousins.[46] Accurate statistics on consanguineous sexual relations are, understandably, much harder to obtain.[47] Global statistics on the prevalence of blood-related marriage provide

40. "Manga" is the Japanese word for what Americans call "comics." Anime is a form of Japanese animation, also referred to as portmanteau Japanimation. Anime is typically influenced by manga. *See generally* GILLES POITRAS, ANIME ESSENTIALS: EVERY THING A FAN NEEDS TO KNOW (2001); FREDERIK L. SCHODT, MANGA! MANGA!: THE WORLD OF JAPANESE COMICS (1983).

41. There are a number of notable anime series dealing with incest between major characters, most often between older brothers and younger sisters. *See generally* KOI KAZE (Geneon Entertainment 2004); MARMALADE BOY (Toei Animation 1994); CREAM LEMON (New Century 1984).

42. *See* Nikki Racklin, *We Are Family*, OBSERVER, Dec. 8, 2002, *available at* http://observer.guardian.co.uk/magazine/story/0,11913,855907,00.html.

43. H.E. Malden, *Historic Genealogy*, 4 TRANSACTIONS ROYAL HIST. SOC'Y 103 (1889).

44. *See* Alan H. Bittles, *Empirical Estimates of the Global Prevalence of Consanguineous Marriage in Contemporary Societies* 15–18 tbl.1 (Morrison Inst. for Population & Resource Studies Stanford Univ., Working Paper No. 74, 1998); *see also* A.H. Bittles, *Consanguinity and Its Relevance to Clinical Genetics*, 60 CLINICAL GENETICS 89 (2001) [hereinafter Bittles, *Clinical Genetics*]; Alan H. Bittles, *The Role and Significance of Consanguinity as a Demographic Variable*, 20 POPULATION & DEV. REV. 561 (1994) [hereinafter Bittles, *Demographic Variable*].

45. Bittles, *Clinical Genetics*, *supra* note 44, at 90.

46. Bittles, *Demographic Variable*, *supra* note 44, at 563.

47. Graham Hughes, *The Crime of Incest*, 55 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 322, 325 (1964).

only a rough approximation of what is, potentially, the larger number of instances of consanguineous sexual relations.

D. Legal Reponses to Incest

Unlike sodomy, incest in England "was originally in the jurisdiction of the ecclesiastical courts and so has no history at common law."[48] Incest "was given a statutory form in the Punishment of Incest Act" of 1908, which criminalized relations between a man and his daughter, sister, mother, or granddaughter, but did not criminalize relationships between an uncle and niece or a stepfather and stepdaughter.[49] The law addressed grandfather and granddaughter relations, while leaving grandmother and grandson relations unaffected.[50] As in England, incest was not a common-law crime in the United States.[51] Utah, for example, "where the Mormon community did not disapprove of incestuous relationships," did not criminalize incest until 1892.[52] Unique in the English-speaking world, many states eventually added first cousins to their criminal incest statutes, whereas first-cousin relationships and marriage have always been legal in England.[53] Rhode Island did, at one point, carve out an exception for Jews to marry first cousins as permitted by the dictates of their faith.[54] Notably, no Western European country appears to prohibit marriage between first cousins,[55] and first-cousin marriage is also legal throughout Canada and Mexico.[56] In Sweden, marriage between half-siblings is permitted under that country's 1987 Swedish Marriage Law.[57] The United States is the only Western country with such explicit first-cousin marriage restrictions.[58] The inclusion of marriage as a point of reference is important because criminal incest statutes are often tied to a state's marriage statute; the

48. *Id.* at 322.

49. *Id.*

50. *See id.*

51. *Id.* at 323.

52. *Id.*

53. Hughes, *supra* note 47, at 323.

54. *Id.* at 323 n.6.

55. *See id.* at 323.

56. Código Civil Federal [C.C.F.] [Federal Civil Code], *as amended*, Artículo 156, Diario Oficial de la Federación [D.O.], 12 de Diciembre de 2004 (Mex.); The Marriage (Prohibited Degrees) Act, 1990 S.C., ch.46 (Can.).

57. MINISTRY OF JUSTICE, FAMILY LAW: INFORMATION ON THE RULES 8 (rev. ed. 2007), *available at* http://www.sweden.gov.se/content/1/c6/07/96/97/42c339cc.pdf.

58. *See generally* McDonnell, *supra* note 5.

crime of incest is frequently determined by reference to the parties prohibited from marrying.[59]

In the United States, criminal prohibitions of incest vary wildly. Rhode Island repealed its incest law altogether in 1989.[60] Michigan and New Jersey make incest "a subcategory of criminal sexual conduct" when either party to the relationship is between thirteen and sixteen years old.[61] Interestingly, fewer states forbid incestuous sexual relations between first cousins than forbade sodomy before *Lawrence v. Texas*.[62] Wisconsin's incest statute appears to be designed with genetic risks in mind.[63] The Kansas incest law, an example of a less targeted statute, even covers same-sex incest.[64] Florida's law limits its prohibition of incest to vaginal sex between a man and woman.[65] The Ohio statute does not criminalize incest between adult brothers and sisters.[66] In its section on criminal incest, the Model Penal Code states that "[a] person is guilty of incest, a felony of the third degree, if he knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood [or an uncle, aunt, nephew or niece of the whole blood]."[67]

E. Constitutional Precedents

Allen Muth's criminal incest case centered, in large part, on the meaning of the Supreme Court's decision in *Lawrence v. Texas*.[68] *Lawrence* is the most recent in a long line of cases involving a "right to privacy" or "liberty interest" under the Fourteenth Amendment.[69] In *Lawrence*, the Supreme Court held a Texas sodomy statute unconstitutional.[70] The Texas statute criminalized only homosexual sodomy; yet the Court did not base its ruling on equal protection grounds, which would conceivably have permitted a statute applying to both opposite and same-sex sodomy.[71] Instead, it relied on substantive due

59. *See, e.g.*, WIS. STAT. ANN. § 944.06 (West 2005). Wisconsin's incest statute, for example, makes incest criminal where the persons are "related in a degree within which the marriage of the parties is prohibited by the law of this state." *Id.*

60. R.I. GEN. LAWS § 11-6-3 (repealed 1989).

61. Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501, 1564 (1998).

62. McDonnell, *supra* note 5, at 350.

63. WIS. STAT. ANN. § 944.06.

64. KAN. STAT. ANN. §§ 21-3602 to -3603 (1995).

65. FLA. STAT. ANN. § 826.04 (West 2006).

66. OHIO REV. CODE ANN. § 2907.03(A)(5) (LexisNexis 2006).

67. *See* MODEL PENAL CODE § 230.2 (Official Draft and Revised Comments 1980) (alteration in original).

68. 539 U.S. 558 (2003); *see also infra* notes 137–146.

69. *See infra* notes 80–106 and accompanying text.

70. *Lawrence*, 539 U.S. at 578–79.

71. *Id.* at 579–81 (O'Connor, J., concurring).

process.[72] *Lawrence* explicitly overruled *Bowers v. Hardwick*, a case that upheld Georgia's criminal sodomy statute.[73] In striking down the Texas statute, the Court held that the law violated the petitioner's "liberty interest."[74] Justice Anthony Kennedy, writing for the majority in *Lawrence*, defined this interest broadly:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.[75]

Lawrence elaborated upon the fact that the Fourteenth Amendment provides constitutional protection to personal, intimate decisions relating to areas like marriage, procreation, contraception, family relationships, childrearing, and education.[76] But in reaching its conclusion, the majority in *Lawrence* did not claim that either sex or "homosexual sodomy" is a "fundamental right," as it often has for various other asserted rights in Fourteenth Amendment cases.[77] The decision appears to have used a "rational basis" test.[78] In its application of that test, the Court was persuaded, in part, by the fact that the Texas sodomy statute was not regularly enforced, and by the fact that a number of state legislatures had decriminalized the conduct at issue.[79]

The import of the decision in *Lawrence* and the language of that opinion owe their genesis to the Court's decision in a very different case. As in *Lawrence*, the Court's holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[80] was arguably grounded in liberty, not privacy.[81] *Casey* was an abortion decision ratifying the core holding of *Roe v. Wade*.[82] In an opinion authored in part by Justice Kennedy, the Court stated, "Neither the Bill of Rights nor the specific

72. *Id.*
73. *Id.* at 578 (majority opinion); *see also* Bowers v. Hardwick, 478 U.S. 186 (1986).
74. *Lawrence*, 539 U.S. at 578.
75. *Id.* at 562.
76. *Id.* at 564–66.
77. *Id.* at 586 (Scalia, J., dissenting).
78. *Id.*
79. *Id.* at 581 (O'Connor, J., concurring).
80. 505 U.S. 833 (1992).
81. *See generally* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, *in* CATO SUPREME COURT REVIEW 2002–2003, at 21 (2003).
82. *Casey*, 505 U.S. 833.

practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of *liberty* which the Fourteenth Amendment protects."[83] The Court noted, "Our obligation is to define the *liberty* of all, not to mandate our own moral code."[84]

The decisions in *Lawrence* and *Casey* seemingly marked a change in the way the Court analyzed and framed issues concerning privacy, sex, procreation, and intimacy. Prior to those decisions, the Court applied a very different analysis to noneconomic liberty or privacy issues, and frequently framed the issues in a much narrower fashion.

Typically, the Court has used two standards of review in cases adjudicating what may be called "substantive due process" rights.[85] Where a "fundamental right" is impaired, the state's objective must be compelling and the means used must be narrowly tailored to meet that objective.[86] Where no "fundamental right" is implicated, the Court requires a rational relationship between a legitimate objective and the means used to effectuate that objective.[87]

The first modern example of substantive due process in the area of noneconomic legislation was the Supreme Court's decision in *Griswold v. Connecticut*.[88] There, the Court struck down a Connecticut statute that banned both the use of contraceptives and the aiding or counseling of others in their use.[89] In striking down the statute, the Court found that it violated a constitutionally unenumerated "right to privacy."[90] The Court identified that right in "specific guarantees in the Bill of Rights [that] have penumbras, formed by emanations from those guarantees that help give them life and substance."[91] The penumbras identified by the Court, according to Justice William Douglas's opinion, emanated from the First, Third, Fourth, Fifth, and Ninth Amendments.[92]

---

83. *Id.* at 848 (emphasis added).

84. *Id.* at 850 (emphasis added).

85. *See* Roe v. Wade, 410 U.S. 113, 168 (1973) (Stewart, J., concurring) (stating that *Griswold* "can be rationally understood only as holding that the Connecticut statute substantively invaded the 'liberty' that is protected by the Due Process Clause of the Fourteenth Amendment").

86. *See generally* Washington v. Glucksberg, 521 U.S. 702 (1997).

87. *Id.* at 728.

88. 381 U.S. 479 (1965); *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

89. *Griswold*, 381 U.S. at 485–86.

90. *Id.*

91. *Id.* at 484.

92. *Id.*

Perhaps the most notable instance of substantive due process was the Supreme Court's 1973 decision in *Roe v. Wade*.[93] In *Roe*, the Court held that a woman's "right of privacy" is a "fundamental right" under the Fourteenth Amendment.[94] Justice Blackmun's opinion jettisoned the penumbra theory of *Griswold*.[95] The Court mentioned *Griswold* only in passing, and instead focused its ruling on the Fourteenth Amendment and other privacy-derived decisions such as *Pierce v. Society of Sisters* and *Meyer v. Nebraska*.[96]

Just over a decade after *Roe*, the Supreme Court decided *Bowers v. Hardwick*.[97] *Bowers*, which was ultimately overturned by *Lawrence*, upheld a Georgia statute criminalizing sodomy.[98] The Court defined the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[99] Justice Byron White, writing for the Court, held that sodomy was not a fundamental right.[100] The Court stated that the standard for determining whether an asserted right is fundamental is whether the right is "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'"[101] The Court also asserted that fundamental rights are those which "are deeply rooted in this Nation's history and tradition."[102] Justice Stevens' dissent, which the Court in *Lawrence* adopted,[103] argued that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[104]

Aside from *Bowers*, there are other decisions in a seemingly more restrictive line of cases than *Lawrence* and *Casey*. In *Washington v.*

93. 410 U.S. 113 (1973).

94. *Id.* at 152–53.

95. *Id.* at 152. Since *Roe*, the Court has steered clear of relying on the substantive holding of *Griswold*.

96. *Id.* at 152–53; *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding that the parent's right to educate one's child as one chooses is protected by the Fourteenth Amendment, and that a state law designed to stifle private schools was unconstitutional); Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (holding that a state law prohibiting children from studying foreign languages in private schools was unconstitutional).

97. 478 U.S. 186 (1986).

98. *Id.* at 196.

99. *Id.* at 190.

100. *Id.* at 191.

101. *Id.* at 191–92 (alteration in original) (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).

102. *Id.* at 192 (internal quotation marks omitted) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)).

103. Lawrence v. Texas, 539 U.S. 558, 577–78 (2003).

104. *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting).

Glucksberg, the Court refused to find a right to commit physician-assisted suicide.[105] In *Michael H. v. Gerald D.*, the Court denied the right of a natural father to be recognized as the legal father of his child.[106] One can see that in prior cases concerning issues of sex, marriage, and procreation, the Court has almost always focused on "fundamental rights" generally, and often the putative "right to privacy" specifically.[107] Certain rights, such as marriage, abortion, and contraception, were held to be fundamental; other rights, such as physician-assisted suicide, sodomy, and certain parental rights, were not.[108]

Various scholars, and sometimes the Court itself, have also argued that, instead of relying on substantive due process, the Ninth Amendment could provide the proper textual basis for cases involving personal liberty and privacy rights.[109] But that approach has failed to garner any support from the Court for nearly fifty years.[110] A more fruitful area may be an analysis not moored to the constitutional text itself, but instead based on what has been termed the "police power" of the state.[111] Some First Amendment cases mirror this analysis. In *Stanley v. Georgia*, for example, the Court held that mere possession of obscene material was not properly prohibited by the State because the private, noncommercial, nonharmful activity of a person in his home is generally free from government regulation.[112] Part IV explores in greater detail the Fourteenth Amendment analysis as applied in *Muth*, as well as a potential "police power" argument that was not raised by the parties.

III. SUBJECT OPINION: *MUTH V. FRANK*

Dorothy and Ernest Muth had, by differing accounts, either nine or fourteen children.[113] Their youngest, Patty, was born in Milwaukee,

105. 521 U.S. 702, 735–36 (1997).

106. 491 U.S. 110, 131–32 (1989). Justice Antonin Scalia, writing for the majority, stated that the Court's analysis should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* at 127 n.6.

107. *See supra* notes 88–104 and accompanying text.

108. *See supra* notes 88–106 and accompanying text.

109. *See* Griswold v. Connecticut, 381 U.S. 479, 491–93 (1965) (Goldberg, J., concurring). *See generally* Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988) (arguing that state governments may not violate unenumerated rights); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85 (2000) (same).

110. *See* Barnett, *supra* note 109, at 4; Niles, *supra* note 109, at 95.

111. *See generally* Barnett, *supra* note 109 (arguing that conceiving of constitutional rights as constraining the exercise of state power is in accord with the intention of the Founders).

112. 394 U.S. 557, 564 (1969).

113. Daniel Voll, *An American Family*, ESQUIRE, July 1998, at 122, 124.

Wisconsin in 1967.[114] Three months after her birth, she was placed in foster care and eventually adopted.[115] Allen, the eldest of the Muth children, is fifteen years older than Patty and spent much of his childhood in a Milwaukee County orphanage.[116] The seven other Muth siblings were scattered throughout Wisconsin.[117] Allen and Patty did not know each other until they met after Patty's high school graduation, when she was eighteen years old and he was thirty-two.[118] Allen and Patty fell in love immediately; Patty got pregnant, and they eventually had four children together.[119] Allen and Patty were not originally aware that they were full brother and sister, but they continued their relationship and had more children even after they learned the truth.[120] The State of Wisconsin petitioned to terminate their parental rights because of the incestuous nature of their parenthood.[121] A Wisconsin court granted termination of their parental rights in *In re Tiffany Nicole M.*[122] Allen and Patricia Muth appealed, challenging the constitutionality of the Wisconsin statute, which permits termination of parental rights upon a showing of incestuous parenthood.[123] The Wisconsin Supreme Court denied review.[124]

Hoping for leniency from the court, Patty agreed to be sterilized.[125] In 1997, after the termination of their parental rights, Allen and Patty Muth were convicted under Wisconsin's criminal incest statute.[126] Despite the fact that she had been sterilized, Patty was sent to a maximum security prison.[127] Allen Muth was sentenced to eight years in a maximum security prison twenty-five miles away.[128] The prosecutor in Milwaukee reportedly stated that she did not "care[ ] if Patty and Allen screwed naked on Wisconsin Avenue, as long as they didn't

114. *Id.*

115. *Id.*

116. *Id.* at 124–25.

117. *Id.* at 124.

118. *Id.* at 125.

119. *See* Voll, *supra* note 113, at 127–28 (stating that the Muths had four children together); *see also* Jeff Jacoby, *Hypocrisy on Adult Consent*, BOSTON GLOBE, Aug. 28, 2005, at C11 (same).

120. Mary Beth Murphy, *Brother, Sister Lose Parental Rights to Son*, MILWAUKEE J. SENTINEL, Feb. 11, 1997, *available at* http://findarticles.com/p/articles/mi_qn4196/is_19970211/ai_n10309613.

121. *In re* Tiffany Nicole M., 571 N.W.2d 872, 873 (Wis. Ct. App. 1997).

122. *Id.*

123. WIS. STAT. ANN. § 48.415(7) (West 2003 & Supp. 2006).

124. *See* Muth v. Frank, 412 F.3d 808, 810 (7th Cir.) (providing the procedural history in the lower courts), *cert. denied*, 126 S. Ct. 575 (2005).

125. Voll, *supra* note 113, at 145.

126. *Id.*

127. *Id.*

128. *Id.*

have children."[129] During their imprisonment, Allen and Patty endured threats and taunting by day and wrote each other by night.[130]

Allen Muth challenged his incest conviction before a Wisconsin Court of Appeals, arguing that the statute was an unconstitutional criminalization of a sexual relationship between consenting adults. The Wisconsin Supreme Court denied Muth's petition for discretionary review,[131] and the case proceeded to the District Court for the Eastern District of Wisconsin.[132] After that court denied his petition for habeas corpus, Muth appealed to the Seventh Circuit Court of Appeals.[133]

The Wisconsin criminal incest statute that Allen Muth challenged states as follows:

> Whoever marries or has nonmarital sexual intercourse with a person he or she knows is a blood relative and such relative is in fact related in a degree within which the marriage of the parties is prohibited by the law of this state is guilty of a Class F felony.[134]

The pertinent marriage statute prohibits marriages between "persons who are nearer of kin than 2nd cousins," with an exception for first cousins if the female is over fifty-five years old or either party is permanently sterile.[135] "Sexual intercourse" is defined by Wisconsin statutes as "vulvar penetration and does not require emission."[136]

The Seventh Circuit, in an opinion written by Judge Daniel Manion, stated that *Lawrence* had held only that states could not "enact laws that criminalize homosexual sodomy" between consenting adults.[137] The court stated that "*Lawrence* . . . did not announce . . . a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct, specifically in this case, incest."[138] Judge Manion noted that *Lawrence* made "no mention of incest,"[139] and insisted that "*Lawrence*, whatever its ramifications, [did] not, in and of itself, go so far."[140] The court summarized its reasoning:

> Given, therefore, the specific focus in *Lawrence* on homosexual sodomy, the absence from the Court's opinion of its own "established

129. *Id.* at 127.
130. *Id.* at 145.
131. State v. Muth, No. 98-1137-CR (Wis. Ct. App. May 23, 2000).
132. Muth v. State, No. 01-C-0398, 2003 WL 24272406 (E.D. Wis. Oct. 3, 2003).
133. Muth v. Frank, 412 F.3d 808 (7th Cir.), *cert. denied*, 126 S. Ct. 575 (2005).
134. WIS. STAT. ANN. § 944.06 (West 2005).
135. WIS. STAT. ANN. § 765.03(1) (West 2001 & Supp. 2006).
136. WIS. STAT. ANN. § 939.22(36) (West 2005).
137. *Muth*, 412 F.3d at 817.
138. *Id.*
139. *Id.*
140. *Id.*

> method" for resolving a claim that a particular practice implicates a fundamental liberty interest, and the absence of strict scrutiny review, we conclude that *Lawrence* did not announce a fundamental right of adults to engage in all forms of private consensual sexual conduct.[141]

Judge Terence Evans concurred with the judgment of the court but wrote separately because he "sense[d] a certain degree of unease, even disdain, for the majority opinion in *Lawrence*."[142] He noted that the majority's numerous citations to Justice Antonin Scalia's dissent in *Lawrence* were, in his opinion, "unnecessary."[143] In fact, *Muth* cited Justice Scalia's dissent in *Lawrence* almost as many times as it did the majority opinion. Judge Evans' concurrence also objected to what he perceived as the "repetitive" paraphrasing of the Texas statute: "As I see it, the term 'homosexual sodomy' is pejorative. It should be scrubbed from court decisions in the future."[144] But Judge Evans felt that extending *Lawrence* to protect incest "demeans the importance of its holding which deals a fatal blow to criminal laws aimed at punishing homosexuals."[145] Like the majority, Judge Evans did not believe that *Lawrence* could be extended to the conduct at issue in *Muth*. He concluded by stating, "Certain varieties of sexual conduct clearly remain outside the reach of *Lawrence*, things like prostitution, public sex, nonconsensual sex, sex involving children, and certainly incest, a condition universally subject to criminal prohibitions."[146]

IV. ANALYSIS

Muth v. Frank was wrongly decided. The Seventh Circuit erred by holding that Allen Muth's private, consensual sexual relations could be proscribed by the state. The court compounded that error by finding that his actions were not protected under the Supreme Court's decision in *Lawrence v. Texas*. This Part argues that *Lawrence* is applicable to private consensual incest between adults.[147] Even if *Lawrence* were not applicable to Allen Muth's case, the court should have asked whether Muth's conduct was properly criminalized under Wisconsin's police power.[148] Under either a Fourteenth Amendment or "police power" analysis, there is no legitimate state interest in the

141. *Id.* at 818.
142. *Id.* at 819 (Evans, J., concurring).
143. *Muth*, 412 F.3d at 819 (Evans, J., concurring).
144. *Id.*
145. *Id.*
146. *Id.*
147. *See infra* notes 151–188 and accompanying text.
148. *See infra* notes 247–252 and accompanying text.

criminal sanctioning of private, consensual, noncommercial, nonharmful sexual relations of two competent adults.[149] Even more problematic is the fact that Wisconsin's statute distinguishes between the various forms of incest on the basis of an outdated understanding of science.[150]

A. *Looking for* Lawrence *in All the Wrong Places*

The most egregious error in *Muth* was the Seventh Circuit's reading of *Lawrence v. Texas*. Perhaps more troubling than the tragic outcome of the decision is that the court's interpretation of *Lawrence* stands precedent on its head, setting back the "liberty interest" of all citizens, not just those engaging in incestuous sexual relations. The opinion is an example of a court acting more from fear and loathing than legal principle and dispassionate objectivity.[151] The court in *Muth* held that "*Lawrence* . . . did not announce . . . a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct, specifically in this case, incest."[152] That statement is true enough: *Lawrence* did not explicitly announce a "fundamental right" to "all manner of consensual sexual conduct,"[153] nor did it announce a "fundamental right" to engage in "homosexual sodomy." Nevertheless, the Supreme Court invalidated the Texas sodomy statute, finding that the practice of sodomy by gay persons can be part of their larger, constitutionally protected liberty interest.[154]

The Court in *Lawrence* announced that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the

149. *See infra* notes 194–199 and 216–220 and accompanying text.

150. *See infra* notes 200–215 and accompanying text.

151. Judge Richard Posner recognized the relative ignorance and discomfort of judges when adjudicating cases involving sexual matters:

> [J]udges know next to nothing about the subject [of sex] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much (not entirely, of course) screened out of the judiciary—especially the federal judiciary, with its elaborate preappointment investigations . . . . This screening . . . is a residue of the nation's puritan—more broadly of its Christian—heritage.

RICHARD A. POSNER, SEX AND REASON 1 (1992).

152. Muth v. Frank, 412 F.3d 808, 817 (7th Cir.), *cert. denied*, 126 S. Ct. 575 (2005).

153. *See* Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) ("Though there is discussion of 'fundamental proposition[s],' and 'fundamental decisions,' nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a 'fundamental right.'" (citations omitted)).

154. *Id.* at 578–79 (majority opinion).

practice."[155] The Court explained the liberty interest at stake: "Liberty protects the person from unwarranted government intrusions . . . . Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes . . . certain intimate conduct."[156]

The Court stated that laws like the Texas sodomy statute "touch[ ] upon the most private human conduct, sexual behavior," and "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[157] That principle "should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[158] The Court defined the issue as "whether the majority may use the power of the State to enforce [its] views on the whole society through operation of the criminal law," and rejected that contention altogether.[159]

The court in *Muth* was not faced with narrow precedent; the *Lawrence* decision is broadly and generously written. Yet even with that expansive language from *Lawrence* to guide it, the court in *Muth* stated that consanguineous people engaging in consensual sex are not the beneficiaries of that decision: "*Lawrence*, whatever its ramifications, does not, in and of itself, go so far."[160] But courts do not frequently "go so far"; that is, in part, why appellate courts exist—to faithfully apply prior law to new cases and extend them where appropriate.[161] Yet in the court's narrow view, the only precedent to be gleaned from *Lawrence* is that "a state cannot enact laws that criminalize homosexual sodomy."[162] Such a narrow interpretation is arguably more in tune with the discredited and discarded jurisprudence that produced *Bowers* than that which yielded *Lawrence*.[163]

155. *Id.* at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986)).

156. *Id.* at 562.

157. *Id.* at 567.

158. *Id.*

159. *Lawrence*, 539 U.S. at 571.

160. Muth v. Frank, 412 F.3d 808, 817 (7th Cir.), *cert. denied*, 126 S. Ct. 575 (2005).

161. *Lawrence* itself is an example. The Court did not limit the reach of prior cases to abortion or contraception. Rather, the Court acknowledged, "There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases." *Lawrence*, 539 U.S. at 564. The Court went on to note that, beginning with *Griswold* and then extending through *Roe*, *Carey*, and *Casey*, the Court has increasingly acknowledged that "the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person." *Id.* at 565.

162. *Muth*, 412 F.3d at 817.

163. It was the *Bowers* Court that engaged in an ultra-specific and narrow review of the Georgia sodomy law at issue in that case, an approach that was explicitly disavowed in *Lawrence*: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the

The court in *Muth* redefined the issue in *Lawrence* with a specificity that is wholly incompatible with the language, tenor, and tone of the decision.[164]

Beyond the dismissive statements that summarily precluded Allen Muth from availing himself of *Lawrence*, the court failed to differentiate sodomy from incest or explain how and why the benefit of *Lawrence* is unavailable to Allen Muth.[165] Judge Manion's opinion made no attempt to explain why incest may be proscribed and sodomy may not.[166] In other words, the court in *Muth* distinguished *Lawrence* on the seemingly self-evident grounds that incest is not "homosexual sodomy," and even if it were, the magic words "fundamental right" were never applied to sodomy.[167] Even if *Lawrence* had announced a fundamental right, it would have made no difference, because *Lawrence* was concerned only with "homosexual sodomy" and not incest.

In a single paragraph that used the phrase "homosexual sodomy" no less than four times in describing *Lawrence*, the court noted that since Allen Muth was not convicted for "homosexual sodomy," he could not avail himself of *Lawrence*.[168] Had Allen Muth had sex with his brother and not his sister, the court would have had to reconcile the fact that homosexual sodomy can also be incestuous, which may have forced the court to address the issue of consensual incest with more subtlety.

That leads one to wonder whether the hypothetically gay Allen Muth posited above, who engaged in consensual adult sodomy with

---

claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Lawrence*, 539 U.S. at 567.

164. Various scholars would likely not agree with the reading of *Lawrence* advanced here. For instance, Professor Cass Sunstein has argued that *Lawrence* is not nearly so broad, and instead stands for the principle that statutes like the Texas sodomy statute are unconstitutional, not because they intrude on behavior that does not harm a third party, but because they "intrude[ ] on private sexual conduct without having significant moral grounding in existing public commitments." Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, *in* 2003 THE SUPREME COURT REVIEW 27, 30 (Dennis J. Hutchison et al. eds., 2004) (emphasis omitted). However accurate Sunstein's reading of *Lawrence* is, the Seventh Circuit's depiction of the issue as homosexual sodomy versus incest is untenable. The Court in *Lawrence* was not concerned with sodomy as an act, but rather sodomy as a means of expressing a person's intimate feelings. As the *Lawrence* decision itself noted, "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." *Lawrence*, 539 U.S. at 567.

165. Judge Manion's opinion implicitly dismissed the necessity of making such a differentiation by concluding, "The ultimate question then is . . . whether Muth is a beneficiary of the rule *Lawrence* announced. He is not. *Lawrence* did not address the constitutionality of incest statutes." *Muth*, 412 F.3d at 817.

166. *See id.* at 816–18.

167. *See supra* notes 137–141 and accompanying text.

168. *Muth*, 412 F.3d at 817.

his brother and was convicted under a state incest statute, could then avail himself of *Lawrence* before the Seventh Circuit.[169] If not, then *Lawrence* does not really mean what the Supreme Court said it meant,[170] and the Seventh Circuit would have some explaining to do.

The *Muth* court's persistent use of the phrase "homosexual sodomy," seven times in two pages, seems disingenuous. It seems designed to bolster the court's finding of a "specific focus in *Lawrence* on homosexual sodomy,"[171] despite the fact that Justice Kennedy's lengthy opinion used the term only twice in nearly twenty pages.[172] Judge Evans objected to the repeated use of the term; Judge Manion responded by counting the number of times the *Lawrence* court used the phrase "homosexual sodomy," although he also included references to "sodomy," whether attached to the word "homosexual" or not.[173]

The *Muth* court continued its opinion by noting that "[t]here is no mention of incest in the Court's opinion."[174] The court was indeed correct; *Lawrence* does not mention incest, nor does *Lawrence* address any of the other genres of sexual conduct engaged in by consenting adults in the privacy of their homes.[175] It is not necessary that the Supreme Court do so in order for a lower court to fairly apply *Lawrence* as precedent and connect the inferential and jurisprudential dots.[176] Courts of appeal have been able to read the Supreme Court "tea leaves" with astounding alacrity for years in any number of areas

169. *See supra* note 162 and accompanying text. The Wisconsin criminal incest statute, requiring sexual intercourse with vulvar penetration, would preclude the state from prosecuting gay incest. *See* WIS. STAT. ANN. § 944.06 (West 2005). However, if Allen Muth was a citizen of Kansas, he could be prosecuted for gay incest. *See* KAN. STAT. ANN. § 21-3602 (West 2002).

170. *See supra* notes 68–79 and accompanying text. The court in *Lawrence* did not hold that only some types of homosexual sodomy are protected.

171. *Muth*, 412 F.3d at 818.

172. *See* Lawrence v. Texas, 539 U.S. 558, 569, 570 (2003). Justice O'Connor's concurrence, a much shorter opinion, used the term four times. Justice Scalia's dissent used the term sixteen times.

173. *See Muth*, 412 F.3d at 812 n.4. In a footnote, Judge Manion defended his position:

> In his concurring opinion, our colleague suggests that the term "homosexual sodomy" is used by this court in a pejorative fashion. Use of the word sodomy or "homosexual sodomy" to discuss the sexual conduct *Lawrence* addressed is not original to this decision. The majority opinion in *Lawrence* used the term "sodomy" no less than seventeen times and the phrase "homosexual sodomy" twice.

Id. Judge Manion went on to cite three other post-*Lawrence* federal cases where the term "homosexual sodomy" had been used. *Id.* (citing Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1236 (11th Cir. 2004); D.L.S. v. Utah, 374 F.3d 971, 975 (10th Cir. 2004); Anderson v. Morrow, 371 F.3d 1027, 1034 n.4 (9th Cir. 2004)).

174. *Id.* at 817.

175. *See Lawrence*, 539 U.S. 558.

176. This was the very basis for Justice Scalia's dissent in *Lawrence*; he feared how it would be applied in future cases. *See id.* at 604 (Scalia, J., dissenting).

of law. The fact that a decision failed to account for every possible contingency and permutation has rarely, if ever, prevented the lower courts from extending the Supreme Court's holdings.[177]

The Seventh Circuit concluded its opinion by reiterating its perception of *Lawrence*'s "specific focus in *Lawrence* on homosexual sodomy.[178] That conclusion advances a highly questionable understanding of *Lawrence*. As already noted, one finds the phrase "homosexual sodomy" used only twice by the *Lawrence* majority.[179] Any "specific focus" on that act or behavior seems to be on the part of the Seventh Circuit. Furthermore, the *Lawrence* decision focused on liberty, not on a particular form of sexual relations.[180]

Finally, Judge Manion's claim that the absence of the indicia of a fundamental right from the Court's opinion makes *Lawrence* inapplicable to Allen Muth's case is specious. The strict scrutiny/fundamental right argument Judge Manion's opinion relied on was drawn from Justice Scalia's dissent in *Lawrence*.[181] Moreover, the *Muth* decision resuscitated several other cases[182] that seem anachronistic in light of *Lawrence*; it relied on the Eleventh Circuit's own narrow reading of *Lawrence* from a 2004 case involving gay and lesbian adoption in Florida.[183] The *Muth* decision cited to that Eleventh Circuit decision three times, including several substantial quotations.[184] That the Seventh Circuit arguably adjudicated Allen Muth's case on the basis of Justice Scalia's dissent in *Lawrence*, and the Eleventh Circuit's reading of *Lawrence* in an entirely distinguishable case, is highly troublesome. One would expect the court to apply *Lawrence* to the case before it and attempt some showing of analogy or distinction, rather than apply a secondhand interpretation from an inapposite case, hybridized with the views of the primary dissenter in *Lawrence*.

---

177. Justice Scalia's dissent in *Lawrence* has been criticized for falsely engaging in a "slippery slope" analysis, forecasting the possibility that the courts would be compelled to invalidate state laws concerning incest, fornication, bestiality, prostitution, etc. *See infra* note 227 and accompanying text. He was undoubtedly correct to some degree when writing about those laws: "[They are] sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding." *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting). Justice Scalia thus recognized that other courts could rely upon *Lawrence* in areas beyond homosexual sodomy.

178. *Muth*, 412 F.3d at 818.

179. *See supra* note 172 and accompanying text.

180. *See supra* note 68–76 and accompanying text.

181. *See Muth*, 412 F.3d at 817.

182. *Id.* (citing Washington v. Glucksburg, 521 U.S. 702 (1997); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)).

183. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004).

184. *Muth*, 412 F.3d at 818 (citing *Lofton*, 358 F.3d 804).

The Seventh Circuit's decision is but one more example of the battle between defining a particular liberty interest with relative specificity or generality that *Lawrence* arguably rendered irrelevant, or at least permanently altered. That the *Lawrence* Court did not classify sodomy as a "fundamental right" is of little moment. Jurisprudence is not witchcraft; there are no special incantations that must be faithfully chanted. It is a matter of reasoning and logic, both deductive and inductive. By not following the broad principles in *Lawrence*, the Seventh Circuit disingenuously ignored what *Lawrence* actually stood for. *Muth* used the shaky foundation of Justice Scalia's dissent, along with choice quotations taken out of context, to cast *Lawrence* as a typical, run-of-the-mill, rational basis case.[185]

The Seventh Circuit made much of the fact that *Lawrence* "did not apply the specific method it had previously created for determining whether a substantive due process claim implicated a fundamental right."[186] Judge Richard Posner, himself a member of the Seventh Circuit, recognized what the panel in *Muth* failed to appreciate: rational basis review "is not in fact a single standard,"[187] and appellate courts "should follow what the Supreme Court does and not just what it says it is doing."[188] In *Muth*, the Seventh Circuit did exactly the opposite; it followed exactly what the Supreme Court did not do and did not say.

B. Sodomy Statutes and Incest Statutes: The Numbers Game

Conspicuous in its absence from the Seventh Circuit's decision is an analysis comparing criminal incest laws to criminal sodomy laws. The *Lawrence* opinion directed a great deal of attention to the fact that numerous states had repealed their criminal sodomy statutes.[189] This was, for the Court in *Lawrence*, vital and persuasive evidence of the

185. The Seventh Circuit relied upon Justice Scalia's dissent for guidance regarding *Lawrence*. In light of Justice Scalia's self-evident hostility toward the majority's decision in that case, relying upon his dissent arguably reflects an unease or displeasure with the *Lawrence* holding. The court also cherry-picked two quotations from *Carey* and *Glucksburg* that were irrelevant to both *Muth* and *Lawrence*. *See id.* at 817.

186. *Id.*

187. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 768 (7th Cir. 2003) (Posner, J., dissenting) (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985)).

188. *Id.* at 769.

189. *See* Lawrence v. Texas, 539 U.S. 558, 572–73 (2003). The *Lawrence* decision noted that prior to 1961, all fifty states outlawed sodomy. The Court also reflected upon the fact that "[t]he 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct." *Id.* at 573.

unsustainability of those laws.[190] As one commentator noted, "At the time the Model Penal Code was drafted, eighteen states prohibited sex between first cousins, and that number has now dropped to eight. Thus, incest between first cousins today is forbidden by fewer states than forbade sodomy before *Lawrence*."[191] If the number of states moving toward decriminalization was an important factor in *Lawrence*, it is curious that the court in *Muth* did not even attempt to survey the current state of criminal incest laws.[192] Not only have a number of states decriminalized various forms of incest, but the overall trend has been persistently toward decriminalization.[193] The Seventh Circuit made no mention of this.

C. *The Abuse Excuse*

Some critics have argued that criminal incest statutes exist to prohibit intrafamilial sexual abuse, a concern not present in *Lawrence*. This argument may justify prohibiting the coercive sexual abuse of a minor child,[194] but not adult consensual incest. In any event, it bears noting that the narrow definitions of criminal incest that currently exist in many states (e.g., penile-vaginal sexual intercourse) suggest that such laws are underinclusive.[195] Certainly a statute prohibiting penile-vaginal intercourse but permitting other sexual activities is not really advancing the goal of curtailing sexual abuse.[196] The purported rationale of preventing abuse is unpersuasive because brother-sister or father-daughter incest is permitted in many states, provided the parties are not related by blood.[197] In a handful of states, certain forms of incest are even permitted despite the existence of a blood relationship.[198] Intrafamilial sexual abuse of minors is addressed most frequently and properly through state laws against sexual assault, molestation, and rape.[199] Finally, Wisconsin already has a criminal statute that specifically addresses incest with a child.

---

190. *See supra* note 79 and accompanying text.

191. McDonnell, *supra* note 5, at 350.

192. *See Muth*, 412 F.3d 808.

193. McDonnell, *supra* note 5, at 350.

194. *See supra* note 24 and accompanying text.

195. *See supra* notes 60–67 and accompanying text.

196. The criminal incest law of Florida makes reference to penile-vaginal intercourse, but would leave unpunished, at least under its incest law, intrafamilial fellatio and sodomy. FLA. STAT. ANN. § 826.04 (West 2006).

197. *See supra* note 23 and accompanying text. In states like Massachusetts, relation by affinity does not come within the scope of criminal incest statutes.

198. McDonnell, *supra* note 5, at 361–63 tbl.1.

199. *See infra* note 25 and accompanying text.

D. Eugen(et)ics and Health: The Irrational Basis

In addition to abuse, the most persistent rationales offered for criminal incest laws are the genetic and health arguments. As these lines of argument go, incest may be properly proscribed because of the deleterious health effects on incestuous progeny.[200] But the genetic rationale is backward. The mere fact that a child is born with recessive genetic traits because of his or her incestuous parentage is wholly unremarkable; numerous children with recessive genetic traits are born every hour of the day from nonincestuous unions. Society would not likely say that their parents should be criminalized for having parented with the advance knowledge that the child may be at risk for greater health risks.[201] Wisconsin does not require nonconsanguineous parents with a history of sickle cell anemia, Tay-Sachs, cystic fibrosis, or Huntington's disease to be sterilized before they can have sexual relations.[202] Moreover, Wisconsin has not as yet placed parents who carry those genetic traits in prison for having sexual intercourse.

The first exhaustive analyses of the effects of human "inbreeding" began in the middle of the last century.[203] That research demonstrated that consanguineous unions were pervasive across demographics of religious and socioeconomic backgrounds.[204] Alan Bittles, a leading scholar in the study of consanguinity, noted this phenomenon:

> Despite the widespread belief that fertility is reduced in consanguineous unions, studies conducted in a wide range of populations have reported reduced levels of pathological sterility, and no evidence of an increase in fetal loss rates. Indirect indicators of fetal survival, such as multiple birth rates and the secondary sex ratio, also failed to show an inbreeding effect.[205]

Moreover, in some cases, consensual incest may actually decrease the risk of certain diseases.

One study has shown that consanguineous parentage may decrease the risk of certain lymphoid malignancies like breast cancer.[206] The study demonstrated that consanguinity "may decrease the frequency

200. A.H. Bittles, *Incest Re-assessed*, 280 NATURE 107 (1979).

201. *Id.*

202. *See id.* Tay-Sachs, for example, presents a 50% risk of transmission to child from parent—lower than incest risks, generally. *See* National Tay-Sachs & Allied Diseases Association, Inc., Modes of Inheritance, http://www.ntsad.org/S02/S02modes.htm (last visited May 23, 2007).

203. Bittles, *Demographic Variable*, *supra* note 44.

204. Bittles, *Clinical Genetics*, *supra* note 44.

205. *Id.* at 92 (citations omitted).

206. S. Denic & A. Bener, *Consanguinity Decreases Risk of Breast Cancer—Cervical Cancer Unaffected*, 85 BRIT. J. CANCER 1675 (2001).

of recessive tumour genes, theoretically, leading to a lower incidence of cancer in a consanguineous population."[207] There has also been little evidence showing a correlation between consanguinity and spontaneous abortion or miscarriage.[208] It appears from the data that "unless deleterious recessive genes are operational very early in pregnancy, in effect before the first missed menstrual period, consanguinity does not appear to adversely influence the incidence of prenatal losses."[209] When consanguinity does lead to adverse health effects, it is due to the "expression of rare, recessive genes inherited from a common ancestor."[210] As Bittles has noted, "[t]oo often there has been uncritical acceptance of data purporting to demonstrate the action of deleterious recessive genes, despite a lack of information on the comparative socioeconomic profiles of consanguineous and nonconsanguineous groups."[211] In terms of major congenital malformations that are purportedly higher in consanguineous progeny, too many of the studies fail to discriminate between genetic and nongenetic determinants of morbidity.[212] In consanguineous pairings, there is also the increased probability that positive recessive traits will be expressed.[213] The genetic "dangers" of first-cousin consanguineous unions producing "damaged" progeny is probably not higher than nonconsanguineous couplings.[214] The risk of inherited diseases such as cystic fibrosis, muscular dystrophy, sickle cell anemia, and Huntington's disease is actually higher than the risk of serious birth defect in consanguineous progeny.[215] Wisconsin has not passed legislation to prevent these parents from having children. Additionally, it would be difficult for Wisconsin to assert genetics as a rationale when, by the plain terms of the statutory code, it criminalizes even consanguineous sexual intercourse without emission.

E. Morality Is "Rationally Related" to Nothing

Having demonstrated that the abuse and genetic rationales for criminal incest laws will not suffice, one is left with one other ratio-

207. *Id.* at 1675.
208. *See* Bittles, *Demographic Variable*, *supra* note 44, at 568.
209. *Id.* at 569.
210. *Id.* at 571.
211. *Id.* at 572.
212. *Id.* at 572–74.
213. *Id.*
214. *See* Robin L. Bennett et al., *Genetic Counseling and Screening of Consanguineous Couples and Their Offspring: Recommendations of the National Society of Genetic Counselors*, 11 J. GENETIC COUNSELING 97 (2002).
215. *See id.*

nale—morality. Many laws appear to be based on morality, but one can easily discern a nonmoral justification for those laws.[216] The justifications vary, but at their root is the idea that once a person's liberty transgresses another person's liberty, it has changed into license, which the state may proscribe.[217]

That the legislature of Texas found homosexual sodomy "immoral" was not enough to sustain that law; so, too, moral disapproval of sexual relations between adults related by blood cannot suffice.[218] Further, even if Wisconsin argued that its incest statute serves to foster morality, that argument would be plainly and demonstrably false. For example, Wisconsin's statute permits two adult blood brothers or sisters to have sex with each other.[219] It would also permit a seventy-year-old uncle or aunt to have sex with their eighteen-year-old niece or nephew.[220] The possible amorous permutations are nearly inexhaustible. One can easily see, then, that Wisconsin's criminal incest statute is not concerned with fostering any meaningful kind of "morality." And yet, just as with the rationales of genetics and intrafamilial abuse, the *Muth* court made no attempt to determine the relationship between the law and morality. This is most likely because the court would have no facts to rely upon. In other words, if one purpose of the criminal incest statute is to foster morality, and that purpose is legitimate (which is questionable after *Lawrence*), there is no way the court could ever determine that the law was improper: the very fact that it was enacted justifies its moral purpose and existence. Moral notions are slippery and slender reeds to hang a decision on, precisely because they satisfy rational basis analysis by their very nature.

---

216. For example, one need not be "morally" opposed to prostitution to appreciate that its practice implicates commercial and economic concerns that may, perhaps, justify its regulation.

217. *See* Barnett, *supra* note 81, at 37 ("Liberty is and always has been the *properly defined* exercise of freedom. Liberty is and always has been constrained by the rights of others. No one's genuine right to liberty is violated by restricting his or her freedom to rape or murder, because there is no such right in the first place.").

218. *See* Lawrence v. Texas, 539 U.S. 558, 577–78 (2003). The court, adopting Justice Stevens' language from the *Bowers* decision, stated, "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Id.* at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

219. *See* WIS. STAT. ANN. § 944.06 (West 2005). Gay incest is left entirely unsanctioned by the Wisconsin statute.

220. *Id.* Not only would gay incest be permissible, but it seems coercive gay incest between an older uncle and an eighteen-year-old nephew is also permitted, at least under that particular provision.

F. *Wisconsin's Statute Cannot Survive Even a Rational Basis Review*

Wisconsin's criminal incest statute does not advance a "legitimate government interest." Further, Wisconsin's statute does not have a rational basis to support it. The three primary justifications for criminal incest laws are genetic concerns, prevention of abuse, and morality. Wisconsin's law serves none of them. As shown, Wisconsin's statute is not grounded in morality or prevention of abuse. It is a pure genetic defect prevention statute. When viewed in that sense, it is reminiscent of the now-discredited remark from Justice Oliver Wendell Holmes that "three generations of imbeciles are enough."[221] Moreover, Wisconsin's statute is buttressed not by contemporary genetic and scientific knowledge, but by tired tropes and eugenic theories.[222] If Allen and Patty Muth can be imprisoned for years in a maximum security prison for creating children with a speculatively increased risk of health concerns, then Wisconsin ought to invest heavily in its prison system for parents with heart disease, diabetes, and depression. That the Muths' four children are not deformed or disabled speaks volumes. For a rational basis to be rational it must not be biased.[223] Where discrimination is implicated, rationality review requires careful, skeptical scrutiny; arbitrariness cannot be the firm foundation which provides the rationale to lock people up and take away their children.[224]

G. *Judge Evans' Concurrence*

In his concurrence, Judge Evans expressed his own displeasure with the position advanced by Allen Muth, stating that Muth's argument

---

221. Buck v. Bell, 274 U.S. 200, 207 (1927). The Court stated its view on genetics:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

Id. (citation omitted).

222. *See supra* notes 200–215 and accompanying text.

223. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 768–69 (7th Cir. 2003) (Posner, J., dissenting).

224. *Id.* Judge Posner recognized this in the context of Equal Protection: "[D]iscrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities." *Id.* at 769.

"demeans the importance of [*Lawrence*'s] holding."[225] He proceeded to note that *Lawrence* did not extend to "things like prostitution, public sex, nonconsensual sex, sex involving children, and certainly incest, a condition universally subject to criminal prohibitions."[226] Undoubtedly, Judge Evans was correct so far as the first four varieties of sexual conduct are concerned. But like the majority and the other proponents of the slippery slope argument,[227] he failed to grasp the fundamental difference between the first set of sexual acts in his parade of horribles and consensual incest.[228] Legitimate, rational bases exist for criminal sanction of all of those sexual acts, except adult consensual incest. It is also curious that Judge Evans chose to refer to incestual behavior as a "condition," which implies a status or state of being. It is almost reminiscent of the fashion with which homosexuality was viewed in the past, when it was deemed a psychological transvestitism or "inversion" of one's sexual drive.[229] Judge Evans' choice of language highlights the court's apparent inability to address or comprehend what incest is and what it is not; that inability led to the court's erroneous decision.[230] Finally, it bears noting that Judge Evans claimed that incest is "universally subject to criminal prohibitions."[231] Judge Evans provided no authority for such a dramatic statement, per-

225. Muth v. Frank, 412 F.3d 808, 819 (7th Cir.) (Evans, J., concurring), *cert. denied*, 126 S. Ct. 575 (2005).

226. *Id.*

227. For an excellent survey of slippery slope arguments, their use in legal analysis, and the problems with them, see Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003). For an analysis of slippery slope arguments in the context of *Lawrence*, see Ruth E. Sternglantz, Comment, *Raining on the Parade of Horribles: Of Slippery Slopes, Faux Slopes, and Justice Scalia's Dissent in* Lawrence v. Texas, 153 U. PA. L. REV. 1097 (2005). For an article exploring the slippery slope argument as it pertains specifically to incest, see Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543 (2005).

228. Prostitution involves a commercial aspect distinguishing it from consensual incest. Public sex implicates order and societal concerns not relevant to consensual incest occurring in the bedroom. Nonconsensual sex, by definition, is distinguishable from consensual incest. Finally, sex involving children is distinguishable because the existence of statutory rape laws at least implies that sex with a child cannot be consensual in the eyes of the law.

229. *See* HAVELOCK ELLIS, STUDIES IN THE PSYCHOLOGY OF SEX (1942); HAVELOCK ELLIS & JOHN ADDINGTON SYMONDS, SEXUAL INVERSION (Arno Press 1975) (1897); SIGMUND FREUD, *Three Essays on the Theory of Sexuality* (1905), *in* VII THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey trans., 1964); ISRAEL J. GERBER, MAN ON A PENDULUM: A CASE HISTORY OF AN INVERT (1955).

230. *Muth*, 412 F.3d at 819 (Evans, J., concurring).

231. *Id.*

haps because he could not.[232] Incest is far from universally criminalized.[233]

When reflecting upon Judge Evans' concurrence, the truly interesting comparison is not merely the legal analogies or distinctions between *Lawrence* and *Muth*. The real human experiences behind *Lawrence* and *Muth* are even more telling than the sanitized renditions that appear in court opinions. The actual stories of the persons involved in those two cases take a bit of the wind out of the sails of Judge Evans' claim that Muth's argument "demeans" *Lawrence*.

Not much is known about the relationship between the two men who sparked the decision in *Lawrence*.[234] It appears that the two men "may have been occasional sexual partners, but were not in a long-term, committed relationship when they were arrested."[235] The two men, John Geddes Lawrence and Tyron Garner, were apparently introduced to each other by a man with whom Garner was romantically involved.[236] Upon their arrest, the police found an apartment filled with pornography.[237] What is established is that the men were not committed to each other, in the traditional sense of that word, and were instead merely sexual partners.[238]

The facts in *Muth*, on the other hand, tell the story of a couple who met, fell in love, and remained faithful to each other throughout their relationship, including through the birth and rearing of their four children. Certainly the Muths do not appear to have been the best of parents; they also knowingly flouted a criminal law.[239] The point of the factual comparison is not to criticize or belittle the men involved in the *Lawrence* decision or to valorize the Muths. Lawrence and Garner were certainly entitled to express their consensual, private desires and order their lives however they choose. But the notion put forth by Judge Evans, that Allen Muth's argument somehow "demeaned" the holding in *Lawrence*, is an insult made possible only by *au courant* political correctness or a willful blindness to the facts. Justice Kennedy's sweeping paean in *Lawrence* to an "intimacy" transcending all "spatial bounds"[240] would seem more applicable to the

232. *Id.*

233. *See supra* notes 48–67 and accompanying text.

234. *See* Dale Carpenter, *The Unknown Past of* Lawrence v. Texas, 102 MICH. L. REV 1464 (2004).

235. *Id.* at 1478.

236. *Id.*

237. *Id.* at 1484.

238. *See id.* at 1478.

239. *See generally* Voll, *supra* note 113.

240. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

love and devotion between Patty and Allen Muth than the right to have casual sex.

If sodomy laws are wrong because they "punish" a person's expression of his or her sexual desires or romantic instincts, Wisconsin's criminal incest statute is wrong for the same reason. The Muths' crime, like that of homosexuals, is becoming intimate with the wrong person. It is not suggested here that the Muths are in any way more deserving of constitutional protection than the men in *Lawrence*. But the assertion that Allen Muth's behavior demeans Garner's and Lawrence's intimate liberty begs for a dispassionate analysis, however uncomfortable it may be.

That homosexuality, unlike the act of incestuous sexual relations, may not be a choice is irrelevant. Even if sexual orientation is not a choice, engaging in a particular sexual practice certainly is. The issue then is not homosexuality *contra* incest, it is sodomy *contra* incest. Certainly one would not argue that the homosexual *qua* homosexual is compelled or driven to a particular sex practice, namely sodomy, compulsively. Indeed, most gay men do not practice anal sex exclusively or even predominately.[241] The Muths were free under Wisconsin law to engage in other sexual acts, but could not cross that Rubicon and engage in penile-vaginal intercourse, even if that intercourse did not lead to seminal emission.[242] The Texas sodomy statute and the Wisconsin incest statute are alike in that both punish behaviors, not conditions or orientations.[243] In that limited sense, Justice Scalia was correct when he sarcastically upbraided Justice O'Connor for arguing that the Texas law was directed toward gay people as a class: "A law against public nudity targets 'the conduct that is closely correlated with being a nudist,' and hence 'is targeted at more than conduct'; it is 'directed toward nudists as a class.'"[244]

It also bears commenting that the risk to the actual individuals engaged in incestuous sexual acts is no greater than the risk to any other heterosexual couple. Incest does not, by some mystical occurrence,

241. Studies indicate that anal sex is practiced by 45% to 50% of gay men, only 15% more than heterosexuals. *See* William D. Moshe et al., *Sexual Behavior and Selected Health Measures: Men and Women 15–44 Years of Age, United States, 2002*, ADVANCE DATA FROM VITAL & HEALTH STAT. (Ctrs. for Disease Control & Prevention, Nat'l Ctr. for Health Statistics, Hyattsville, Md.), Sept. 15, 2005, *available at* http://www.cdc.gov/nchs/data/ad/ad362.pdf.

242. *See supra* notes 134–136 and accompanying text; *see also* WIS. STAT. ANN. § 944.06 (West 2005).

243. *Compare* WIS. STAT. ANN. § 944.06, *with* TEX. PENAL CODE ANN. § 21.06(a) (2003).

244. *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting); *accord id.* at 583 (O'Connor, J., concurring) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. . . . It is . . . directed toward gay persons as a class.").

cause any sexually transmitted disease or ailment. Unfortunately, the actual health risk to the parties engaged in anal sex in *Lawrence* is appreciable and real, even with the use of prophylactics.[245] Any risk coming from sexual intercourse between Allen and Patricia Muth would only be to a potential offspring, and even that risk is speculative and lower than many genetic risks permitted by states.[246]

H. Sex & Handcuffs: The "Police Power"

Even if the court was unable to determine that Allen Muth's consensual incest was a "liberty interest" protected by the Fourteenth Amendment under *Lawrence*, it should have also inquired whether his conduct was properly proscribable under Wisconsin's police power. State regulation of private consensual sexual acts between consanguineous adults may be beyond the reach of the state's police power, irrespective of a Fourteenth Amendment analysis. The traditional justification for invoking the police power has been to prevent harm.[247] Private consensual incest between adults does not create the type of harm that tends to justify the exercise of state power. The police power should not proscribe behavior based on majoritarian notions of morality or discredited science. Moreover, liberty is potentially inexhaustible—its form, scope, and import vary from person to person and from taste to taste. The police power is subject to limits.[248] Rather than operating from the position that Muth must demonstrate to the court that his "flavor" of liberty is "fundamental," the court should ask if Muth's behavior is something the state may properly prohibit.[249] Professor Randy Barnett wrote an amicus curiae brief in *Lawrence v. Texas*, arguing that the Court should "ask whether the state's police power extends this far, not whether the Defendants have a 'right' to

245. *See generally* GABRIEL ROTELLO, SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN (1997); A.B. Chun et al., *Anal Sphincter Structure and Function in Homosexual Males Engaging in Anoreceptive Intercourse*, 92 AM. J. GASTROENTEROLOGY 465 (1997); Stephen E. Goldstone & Mark L. Welton, *Anorectal Sexually Transmitted Infections in Men Who Have Sex with Men—Special Considerations for Clinicians*, 17 CLINICS COLON & RECTAL SURGERY 235 (2004); A.J.G. Miles et al., *Effect of Anoreceptive Intercourse on Anorectal Function*, 86 J. ROYAL SOC'Y MED. 144 (1993); P. Tilston, *Anal Human Papillomavirus and Anal Cancer*, 50 J. CLINICAL PATHOLOGY 625 (1997).

246. *See supra* notes 200–215 and accompanying text.

247. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1051 (1992).

248. *See, e.g.*, *Lawrence*, 539 U.S. 558 (invalidating state statute prohibiting homosexual sodomy).

249. *See generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004); John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049 (1994); Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST. L.Q. 511 (2000).

engage in the conduct at issue."[250] Barnett noted the problem with a Fourteenth Amendment fundamental rights analysis:

> [T]here are countless private activities that are protected by no tradition or express constitutional provision. It would be unimaginable that they could be prohibited in a free society, even if some objection could be raised to them—cooking unhealthy meals, staying up too late, spending a slothful day drinking coffee and doing puzzles instead of accomplishing something productive. Indeed, almost anything an ordinary person might spend his or her weekend doing, from gardening to cleaning to touching up house paint, would probably not qualify as a "fundamental" right.[251]

Barnett argued that, in our American tradition, the power of government is limited while the number of private liberties is not; moreover, prevention of harm—not regulation of private morality—has been the prime justification for invoking the government's ability to deploy the police power.[252]

The "police power" analysis would, this Note argues, apply with equal force to the issue of consensual adult incest. After having shown the court that his liberty does not "harm" in the sense that justifies police action, Muth should have been adjudged free to engage in consensual sexual relations with his sister. The Seventh Circuit decision, however, confined itself to a traditional Fourteenth Amendment analysis. Had it engaged in the suggested analysis, it would have been able to protect the liberty of Allen Muth without declaring the conduct "fundamental."

V. IMPACT

Muth was an incorrect decision in light of *Lawrence*, granting to the state a police power inconsistent with the principles of this nation. Allen Muth's petition for certiorari was denied by the Supreme Court in October 2005.[253] His case is not likely to alter the jurisprudential landscape. Unfortunately, the facts of his case likely made it a legal "bridge too far" for the courts; the prospect of granting the jurisprudential imprimatur to sex between a brother and sister would give any judge pause. But it would be a mistake to view *Muth* as an aberration. Where a court of appeal may so blatantly distort precedent, the liberty of all citizens stands at risk. The *Muth* decision may not garner much public sympathy; it is unlikely anyone will recall *Muth* as the *Dred*

250. Brief of Institute for Justice as Amicus Curiae in Support of Petitioners at *3, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 164140.

251. *Id.* at *5.

252. *Id.* at *6–13.

253. Muth v. Frank, 126 S. Ct. 575 (2005).

Scott of the sexual realm.[254] But the tough, distasteful cases like *Muth* call for the judiciary to act with reason and independence. When courts fail to do this, the immediate detriment may extend only to the individual parties to the case. The long-term structural detriment, however, is more severe. Erosion of confidence in the courts is not to be discounted. Whether gay sex, incestuous sex, or a case wholly unrelated to sex, where liberty is illegitimately limited, all are impoverished.

The *Muth* decision, in addition to being poorly reasoned, was also inordinately incorrect in light of public policy. There is a line of cases and scholarship that draws upon the politico-philosophical thesis that the state should not criminalize behavior absent harm to an identifiable entity.[255] Consensual incest does not harm a person any more than any other sexual relation might. Moreover, consensual incest differs in vital ways from exploitative incest. Exploitative incest can and should be fully prosecuted by existing criminal laws. But consenting, competent adults have a liberty interest in engaging in incestuous acts. And *Muth* could lead to manifestly unjust results in more factually sympathetic cases, such as those involving artificial reproductive technology (ART)[256] and multiple-father births.[257]

---

254. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

255. *See generally* Barnett *supra* note 81; *see also supra* note 249 and accompanying text.

256. The proliferation of ART makes it more than conjectural that in the near future, consanguineous men and women, initially oblivious to their genetic relationship, will meet and mate. *See* Sheryl Gay Stolberg, *For the Infertile, a High-Tech Treadmill*, N.Y. TIMES, Dec. 14, 1997. What these couples do will technically be incest, thus making their actions no different from Allen and Patty Muth. The *Muth* decision may pose danger for these people. Major segments of the population of Wisconsin and other states would be at risk for imprisonment, given the increasing prevalence of ART.

According to the Centers for Disease Control (CDC), in 2002, approximately sixty-two million American women were of reproductive age. Centers for Disease Control and Prevention, Assisted Reproductive Technology, http://www.cdc.gov/ART/index.htm (last visited May 23, 2007). In that same year, 115,392 ART procedures were reported to CDC. Victoria Clay Wright et al., *Assisted Reproductive Technology Surveillance—United States, 2002*, MORBIDITY & MORTALITY WKLY. REP. (Dep't of Health & Human Servs., Atlanta, Ga.), June 3, 2005, at 5. Over 10% of the ART procedures utilized genetic material from sources other than the mother. *Id.* at 1. And the technology is growing: in a six-year span, the number of ART procedures performed increased from 64,681 to 115,392. *Id.* The number of infants conceived through ART increased at an even greater rate, growing by 120%, from 20,840 infants in 1996 to 45,751 in 2002. *Id.* at 8. Increased use of these technologies will mean that increasing numbers of children will be born to parents who have no genetic relationship to their children. The astounding growth of ART usage presages a very real time and place where consanguineous offspring will meet and procreate without awareness of their genetic "closeness."

257. CDC statistics indicate that 1,415,995 live births occurred to unmarried women in 2003. Joyce A. Martin, *Births: Final Data for 2004*, NAT'L VITAL STAT. REP. (Nat'l Ctr. for Health Statistics), Sept. 29, 2006, at 11, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr55/nvsr55_01.pdf. The total percentage of all births that occur to unmarried women is 34.6%. *Id.* If the trend of out-of-wedlock births remains static, without any further growth, one can easily

Cases like *Lawrence* and *Muth* also have a very real potential to impact other unrelated areas of law. It has been suggested that after *Lawrence*, the Court had turned a corner toward recognizing a sphere of personal liberty that the state could not violate absent identifiable harm to others.[258] Indeed, Barnett has argued that the liberty interest identified in *Lawrence* could go so far as to cover nonsexual activities like medicinal marijuana use.[259] One might uncover other activities that fall within a person's liberty interest. Perhaps use of marijuana in the general population, indeed general drug use, could fall under the *Lawrence* rubric. If *Lawrence* means what it appears to mean, then certainly an argument can be made that engaging in recreational drug use in the home is within a person's liberty interest. Expressions of intimacy through sex, as *Lawrence* noted, are no doubt meaningful and highly personal. But why should the Court limit liberty to the libidinous? Again, *Lawrence* is not merely a case about sodomy, it is a case embracing and endorsing the liberty interest of each person to define what is meaningful in life and act upon it.

Muth, however, provides the courts of appeal shelter to continue marginalizing both sexual and behavioral minorities. *Muth* could have marked a shining example of the courts taking seriously the holding in *Lawrence*, a choice of liberty over loathing. Instead, the opportunity was squandered. Contrary to Judge Evans' concurring opinion, it was the Seventh Circuit that has "demeaned" *Lawrence*. It is incest this

---

envision another subset of children who may potentially reach adulthood and, like the children of ART procedures noted above, meet and mate with consanguineous partners.

While one criticism of consensual incest focuses on the genetic risks to the children of a consanguineous pairing, little attention is paid to the risks facing women who bear children by multiple fathers. These women bear a higher risk for, among other things, an accelerated diagnosis of multiple sclerosis. Olga Basso et al., *Multiple Sclerosis in Women Having Children by Multiple Partners: A Population-Based Study in Denmark*, 10 MULTIPLE SCLEROSIS 621 (2004). Multiple partner-father changes may also subject the mother herself to increased pre-eclampsia risks. Olga Basso et al., *Higher Risk of Pre-eclampsia After Change of Partner: An Effect of Longer Interpregnancy Intervals?*, 12 EPIDEMIOLOGY 624 (2001). Another study also noted that "[w]omen who had children with different men had a higher mortality than women who had the same number of children with the same man." Jørn Olsen et al., *Studying Health Consequences of Microchimerism: Methodological Problems in Studying Health Effects of Procreation with Multiple Partners*, 18 EUR. J. EPIDEMIOLOGY 623, 625 (2003). If health and genetic concerns are the important government interests that states like Wisconsin portray them to be, one wonders whether the legislators in Madison will now see fit to criminalize giving birth to children by different fathers.

258. *See* Barnett, *supra* note 81, at 41. Barnett noted that persons seeking to distribute medicinal marijuana would be greatly benefited by an expansive reading of *Lawrence* if they "did not have to show that their liberty to do so was somehow 'fundamental'—and instead the government were forced to justify its restrictions on that liberty." *Id.*

259. Barnett appeared pro bono before the Supreme Court and the Ninth Circuit Court of Appeals for oral arguments in a case involving medicinal marijuana. *See* Gonzales v. Raich, 545 U.S. 1 (2005); Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2004).

year, but it could conceivably be any "deviant," "perverse," or marginal behavior next year.

VI. CONCLUSION

The decision in *Muth* is an unfortunate example of the persistent inability and unwillingness by the courts to come to grips with human sexuality. In cases like *Muth*, a traditional Fourteenth Amendment "fundamental rights" analysis should be just one facet of a more thorough and holistic approach. The problem with Fourteenth Amendment analysis is that it begins from a first principle at odds with the *raison d'être* of this nation. A better approach for the courts would be to engage in a form of "police power" analysis. Such an analysis is not moored to the text of the Constitution; instead, it presumes the liberty and autonomy of action that the *Lawrence* case comes closest to embodying. This form of analysis appreciates that people engage in numerous and varied behaviors that could never be deemed "fundamental," but are nonetheless basic to the individual. Until those behaviors place another person at risk, the state should refrain from criminally sanctioning them. Courts should thus begin with a presumption that the behavior should not be criminalized, instead of beginning from the defensive posture that people can only be protected if the right implicated is somehow "fundamental."

Under either analysis, the conduct of Allen and Patty Muth is within that sphere of liberty which all citizens enjoy. No real rationale exists for criminalizing their private, consensual, adult sexual acts. The justifications of abuse, morality, and genetics all fail, and the law cannot proscribe behavior solely on the basis of visceral disgust or displeasure.

Love is a passionate and profound area of mankind's existence. The criminal law is ill-equipped to enter into such an area, and it should probably not attempt to do so absent realistic harm to another person. A great chronicler of the vagaries of human love, Tennessee Williams, once wrote, "A line can be straight, or a street, but the human heart . . . it's curved like a road through mountains."[260] One day, courts will fully grasp the meaning of that simple but ineluctable fact of life, and they will leave people to live and love as their liberty dictates. The criminal law should never play the role of moral censor

260. TENNESSEE WILLIAMS, A STREETCAR NAMED DESIRE (1947).

or matchmaker. Absent legitimate harm to another, the law should respect the individual's "right to be let alone."[261]

*Brendan J. Hammer**

261. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Louis Brandeis put it eloquently:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Id.

* J.D. 2007, DePaul University College of Law; B.S. 2004, Indiana University. Thank you to the editorial board of the *DePaul Law Review* for their extraordinary efforts in preparing this Note for publication, and to Professor L. Song Richardson for invaluable advice, encouragement, and insight. Special thanks to my parents, Allen and Judith Hammer, and most especially to my partner in law and life, my wife Vanessa.